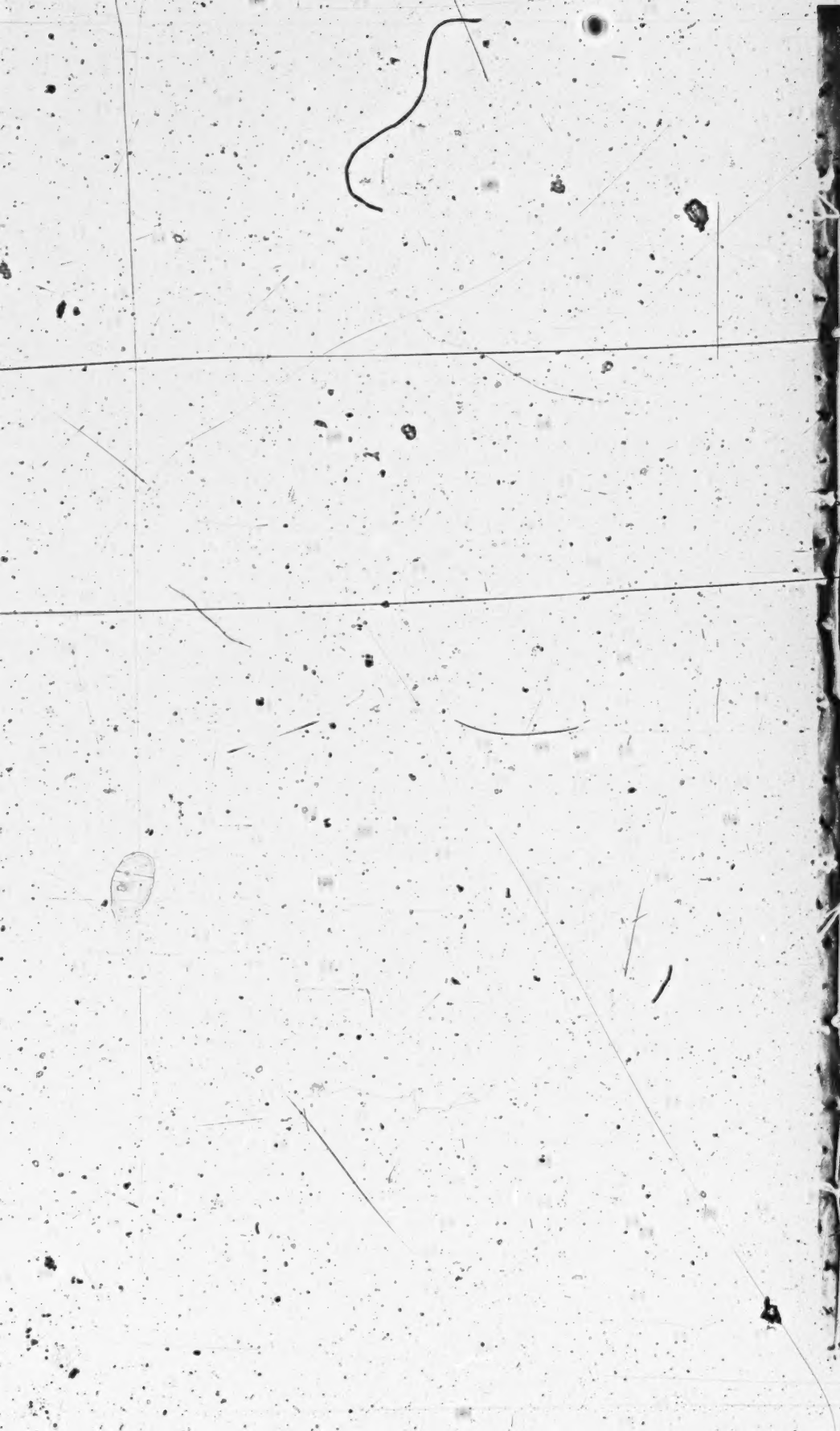

IN THE

Supreme Court of the United States

October Term, 1946.

No. [redacted]75

MANDEVILLE ISLAND FARMS, INC., a Corporation, and ROSCOE C. ZUCKERMAN,

Petitioners,

vs.

AMERICAN CRYSTAL SUGAR COMPANY, a Corporation,

Respondent.

SUPPLEMENTAL BRIEF OF PETITIONERS.

GUY RICHARDS CRUMP,
535 Rowan Building, Los Angeles 13,
Attorney for Petitioners.

Parker & Company, Law Printers, Los Angeles. Phone TR. 5206.

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SUPPLEMENTAL BRIEF OF PETITIONERS.

I.

INTRODUCTORY MATTER.

1. Opinions Below.

The opinion of the District Court is printed in 64 Fed. Supp. 265, and in the Transcript at pp. 100-108. The Circuit Court of Appeals *per curiam* opinion is printed in 159 F. (2d) 71, and in the Transcript at pp. 120-121. Its order denying petition for rehearing was without opinion, and appears in the Transcript at p. 123.

2. Jurisdiction.

The judgment of the Circuit Court of Appeals was filed January 14, 1947; Petition for Rehearing was filed February 12, 1947; the Order denying it was filed March 27, 1947. The Petition for Certiorari was filed within three months of the filing of said Order. The jurisdiction of the Supreme Court was invoked under Sec. 240-a of the Judicial Code of the United States, as amended by Act of February 13, 1925 (28 U. S. C., Sec. 347a). Writ of Certiorari was granted June 2, 1947.

3. Questions Presented.

These were set forth in the Petition for Writ of Certiorari, and are incorporated herein by reference.

4. Statutes Involved.

This is an action brought by persons injured in their business and property by reason of acts forbidden in the Anti-Trust Laws of the United States (15 U. S. C. A., Sees. 1, 2, 7, 15), commonly called the "Sherman Act," and brought in the District in which defendant is found and has an agent, to recover threefold damages.

5. Statement of the Case.

This was set forth in the Petition for Writ of Certiorari, and is incorporated herein by reference.

6. Specifications of Error to Be Urged.

This was set forth in the Petition and is incorporated herein by reference.

II.

SUMMARY OF ARGUMENT.

Appellant's argument can be summarized by setting forth the headings used in the brief:

1. The courts below held that a conspiracy to fix and maintain prices in restraint of trade, which damaged plaintiffs, was alleged but that the Sherman Act was not violated on the ground that "Production" and "Manufacture" were "Local" and not interstate. A mere reading of the complaint shows that the courts below erred. Causes of action are stated under both Sections 1 and 2 of the Act.

2. Congress in passing the Sherman Act left no area of its constitutional power unoccupied. It exercised all the power it possessed. The Sherman Act is a broad and comprehensive and not a limited act, as respondent contends.

3. Paragraphs 1 and 2 of the Sherman Act have both a geographical and distributive significance and apply to any part of the United States as distinguished from the whole.

4. The courts below erred in holding that the price-fixing monopoly herein involved did not come under the Sherman Act.

   A. The contract between the growers and the refinery provided that the price to be paid by the refinery to the grower for the beets was fixed by the returns secured by the refinery from the interstate sale of the processed product. Until the sugar was sold in

interstate commerce, the amount to be paid the grower could not be determined. Therefore, interstate commerce was involved.

B. Under the contract the grower was really selling sugar to the refinery because it was only the sugar in the beets for which he was paid. This sugar, when extracted, was sold in interstate commerce. This latter sale determined the price paid the grower for the beets. Therefore, interstate commerce was involved.

C. The complaint specifically alleged that the various steps involved in the production of beet sugar, from the preparation of the ground for planting of the seed to the sale in interstate commerce of the extracted sugar, were "inextricably intermingled with and directly affected by each other" and were "part of one transaction." Therefore, interstate commerce was involved.

D. Products of the farm which are subsequently manufactured or processed into articles of interstate commerce are within the reach of the Anti-Trust Act. Price-fixing is illegal *per se*. A combination among interstate processers fixing prices to be paid to local producers for their products is reached by the Sherman Act if the processed product is intended to cross state lines.

E. Plaintiffs' cause of action does not depend on plaintiffs being engaged in interstate commerce, because the price-fixing acts com-

plained of were a part of the conspirators' interstate commerce.

F. If respondent refiner had itself grown the beets besides refining them and selling the sugar, each step would have been part of the stream of interstate commerce. This stream was not broken because an independent contractor performed some of the steps.

5. The courts below erroneously held that appellants, although damaged by the price-fixing conspiracy, could not recover because some other farmers were not damaged to the same extent.

6. Trade includes both buying and selling. It is no excuse for monopoly that prices are not raised to the ultimate consumer. The Sherman Act protects buyers and sellers, consumers and producers, not merely consumers and buyers as respondent contends.

7. The District Court relied upon the 1886 decision of *Coe v. Errol* (a tax case) and upon cases following *Coe v. Errol*, in holding that production and manufacture of goods is not commerce. *Coe v. Errol* is no longer any authority on cases arising under the Sherman Act. The Circuit Court of Appeals stated: "We do not approve the citation of tax cases as authority for any issue in this case." But the remaining cases cited by the District Court (and approved by the Circuit Court of Appeals) are, with one exception, cases that rely upon the tax case of *Coe v. Errol*. The exception is *Parker v. Brown*, which supports appellants' and not respondent's

position. As a result, the decision of the Circuit Court of Appeals has no foundation of authority whatsoever.

8. Public interest is involved.

9. The claim is not a stale claim.

10. The District Court erroneously held that farmers who either had to sign the crop contract prepared by the conspirators or not grow any sugar at a time when sugar was vitally needed by this nation, were in *pari delicto* and could not recover because they "joined the conspiracy and furthered the object of the same" by signing the contract. Respondents made no effort to support this ruling before the Circuit Court of Appeals or in their brief in opposition to the granting of certiorari, but the Circuit Court of Appeals, instead of repudiating such a holding stated: "We do not reach and therefore make no expression upon this claim." The Circuit Court of Appeals erred in so doing. The doctrine enunciated by the District Court would result in making "Private remedies under the Sherman Act illusory if not non-existent for many, perhaps most, victims of restraint of trade." Respondents conceded error by making no attempt to support the doctrine and not urging it on appeal. The Circuit Court of Appeals should not have remained passive when faced with such a doctrine but should have definitely repudiated it. This court should establish uniformity by repudiating the District Court's doctrine.

III.

ARGUMENT OF PETITIONERS.

1. The Courts Below Held That a Conspiracy to Fix and Maintain Prices in Restraint of Trade, Which Damaged Plaintiffs, Was Alleged but That the Sherman Act Was Not Violated on the Ground That "Production" and "Manufacture" Were "Local" and Not Interstate. A Mere Reading of the Complaint Shows That the Courts Below Erred. Causes of Action Are Stated Under Both Sections 1 and 2 of the Act.

Since this is an appeal from an order granting a motion to dismiss the complaint on the ground that it did not state facts sufficient to constitute a claim upon which relief could be granted, the allegations of the complaint must be taken as true. (*Columbia Broadcasting System v. U. S.*, 316 U. S. 407, 414.) These are set forth in the Transcript, pages 68 to 96 and can be summarized as follows:

A. The steps involved in the interstate production of beet sugar (the growing, harvesting, and delivery of the beets to the refinery, the processing of the beets into sugar, and the sale and distribution of the raw sugar in *interstate* commerce to the ultimate consumer), were at all times herein mentioned inextricably intermingled with and directly affected by each other and had an immediate relation to each other. Each step was a part of a transaction which commenced when the ground was prepared for planting and which was completed when the sugar was used by the ultimate consumer. [V—T. 71.]. (Roman numerals refer to paragraph numbers of the amended complaint. T refers to the Transcript. The number which follows the T refers to Transcript page.)

B. Defendant and its two co-conspirators were engaged in *interstate* commerce in the selling of sugar-beet seeds, the refining of sugar beets into sugar and the sale of the sugar throughout the country. [II—T. 68-69.]

C. The defendant and its two co-conspirators had a complete monopoly in the sale of sugar beet seeds and the manufacture of sugar beets into sugar in Northern and Central California. They owned and controlled all sugar beet factories there located. No growers of sugar beets in the area could sell sugar beets at a profit except to them. They had the only practical market available to beet growers in the area. [VI—T. 71-74.]

D. Up to and including the 1938 crop season, these three corporations competed with each other [X—T. 77-78], but in 1937 or 1938 they entered into a price-fixing conspiracy in restraint of trade and to create a monopoly [IX—T. 76-77], whereby, during the cropping years of 1939, 1940 and 1941,

(a) they adopted a uniform contract for growers which provided that the price to be paid the growers should be determined by an *identical* formula, under which the average net return received by *all* three conspirators from the sale of the raw sugar in interstate commerce, determined the price paid each grower regardless of with which conspirator the grower contracted. [IX—T. 77];

(b) they paid the same agreed price to all growers, which price was not a reasonable price [IX—T. 77];

(c) they refused to furnish seed (the supply of which they controlled) to, or buy sugar beets from any grower unless he would sign their uniform contract and the grower had either to sign the contract or not grow sugar beets [VI—T. 73];

(d) they no longer competed as to the price to be paid sugar beet growers [IX—T. 78];

(e) they fixed and maintained the price to be paid sugar beet growers [IX—T. 76];

(f) they no longer competed in interstate commerce as to the ability and efficiency of their respective manufacturing, sales or executive departments [IX—T. 76-77];

(g) they no longer endeavored to increase their sales returns and to decrease their expenses as they formerly had done [XI—T. 78-79];

(h) they so conducted their interstate commerce without competition that they received less in sales return for sugar sold in interstate commerce and incurred more expense than they would have had there been competition [XII—T. 79];

(i) they operated as if they were one corporation owning and controlling all sugar beet factories in Northern and Central California but with three completely separate overheads and none of the efficiency which consolidation into one corporation might bring [XII—T. 79-80].

E. As a result of this conspiracy plaintiffs were damaged. The complaint alleges [XVIII—T. 86-86]:

> "Had it not been for said unlawful plan and conspiracy and if said sugar had been manufactured and sold in interstate commerce competition with the sugar of the co-conspirators, unhampered by said plan and conspiracy, plaintiff Mandeville Island Farms, Inc. would have received at least $105,014.60 more, and plaintiff Roscoe C. Zuckerman would have received $37,397.38 more than each did receive under said contracts, and plaintiffs respectively sustained damages accordingly."

(This is a proper measure of damages. *Story Parchment Co. v. Patterson Paper Co.*, 282 U. S. 555; *C. E. Stevens Co. v. Foster & Kleiser Co.*, 311 U. S. 252; *Addyston Pipe and Steel Co. v. U. S.*, 175 U. S. 211.)

The courts below held that no cause of action was stated and dismissed the complaint.

We respectfully submit that a mere reading of the complaint shows that the courts below erred and that causes of action are stated under both Sections 1 and 2 of the Sherman Act. However, from an abundance of caution, we will particularize upon our position.

2. Congress in Passing the Sherman Act Left No Area of Its Constitutional Power Unoccupied. It Exercised All the Power It Possessed. The Sherman Act Is a Broad and Comprehensive and Not a Limited Act as Respondent Contends.

As the Supreme Court stated in *U. S. v. Southeastern Underwriters Assn.*, 322 U. S. 533, 546:

> "The real answer to the question before us is to be found in the Commerce Clause itself and in some of the great cases which interpret it. Many decisions make vivid the broad and true meaning of that clause."

Congress has passed various statutes under the Commerce Clause, but in passing the Sherman Act it "left no area of its constitutional power unoccupied; it exercised all the power it had." (*Atlantic Cleaners and Dyers, Inc. v. U. S.*, 286 U. S. 427, 435; *Apex Hosiery Company v. Leader*, 310 U. S. 469, 495; *U. S. v. Frankfort Distilleries*, 324 U. S. 293, 298. See also, *U. S. v. Darby*, 312 U. S. 100, limiting *Carter v. Carter Coal Co.*, 298 U. S. 238,

and holding (p. 122) that "The Sherman Act and the National Labor Relations Act are familiar examples of the exertion of the commerce power to prohibit or control activities wholly intrastate because of their effect on interstate commerce.")

Respondents argued in their Brief in Opposition to Writ of Certiorari (p. 10 *et seq.*) that while the events here involved would be interstate commerce under the Fair Labor Standards Act, the National Labor Relations Act, the Packers and Stock Yards Act, the Tobacco Inspection Act, and the Agricultural Adjustment Act, such events are not interstate commerce under the Sherman Act, because the Sherman Act is an old act, never amended and because Congress, while having the power to include these events under the Sherman Act, did not exercise that power.

The same contention was unsuccessfully made in *U. S. v. Southeastern Underwriters Assn.*, 322 U. S. 533, where the Supreme Court stated, at page 553:

> "We come then to the contention, earnestly pressed upon us by appellees, that Congress did not intend in the Sherman Act to exercise its power over the interstate insurance trade."

The court then stated:

> "Certainly the Act's language affords no basis for this contention . . . Language more comprehensive is difficult to conceive. On its face it shows a carefully studied attempt to bring within the Act every person engaged in business whose activities might restrain or monopolize commercial intercourse among the states.
>
> "A general application of the Act to all combinations of business and capital organized to suppress

commercial competition is in harmony with the spirit and impulses of the times which gave it birth. 'Trusts' and 'monopolies' were the terror of the period . . . So great was the strength of the anti-trust forces that the issue of trusts and monopolies became non-partisan. The question was not whether they should be abolished, but how this purpose could best be accomplished."

The court stated at page 556:

". . . we fail to find in the legislative history of the Act an expression of a clear and unequivocal desire of Congress to legislate only within that area previously declared by this Court to be within the federal power . . . We have been shown not one piece of reliable evidence that the Congress of 1890 intended to freeze the proscription of the Sherman Act within the mold of then current judicial decisions defining the commerce power. On the contrary, all the acceptable evidence points the other way. That Congress wanted to go to the utmost extent of its Constitutional power in restraining trust and monopoly agreements such as the indictment here charges, admits of little, if any doubt. The purpose was to use that power to make of ours, so far as Congress could under our dual system, a competitive business economy."

The courts below instead of applying the "great cases" which interpreted the Commerce Clause and which made "vivid the broad and true meaning of that clause," applied the outmoded "distinction between what has been called 'local' and what 'interstate,' a type of mechanical criterion which this court has not deemed controlling in the measurement of federal power." (*U. S. v. Southeastern Underwriters Assn.*, 322 U. S. 533, 546.)

Therefore, we will, in this brief, as did the Supreme Court in the *Southeastern Underwriters Assn.* case, cite as authority cases arising not only under the Sherman Act but also under various other acts passed by Congress under the Commerce Clause.

Respondents in their Brief in Opposition to Petition for Writ of Certiorari brush the latter cases aside on the ground that they are based on "regulatory statutes." Yet an analysis of *U. S. v. Southeastern Underwriters Assn.*, 322 U. S. 533, a Sherman Act case, shows that the Supreme Court cited far more non-Sherman Act cases in its opinion than it did Sherman Act cases.

Respondent in said Brief (p. 13) cites *Federal Trade Commission v. Bunte*, 312 U. S. 349 as authority for respondent's claim that "later and more detailed regulatory statutes afford no reliable guide for the interpretation of such earlier statutes as the Sherman Act, the Federal Trade Commission Act and the Clayton Act." Respondent has not correctly applied this case. It specifically refers to *U. S. v. Darby*, 312 U. S. 100, decided a few weeks previously. A reading of these two cases clearly shows that the Supreme Court held that "the Sherman Act and the National Labor Relations Board Act are familiar examples of the exercise of the commerce power to prohibit or control activities wholly intrastate because of their effect on interstate commerce." *U. S. v. Darby*, 312 U. S. 100, 120.

Respondent places great stress upon the fact that Sections 1 and 2 of the Sherman Act have not been amended, but appellant is blind to the "great changes and develop-

ment in the business of this country." In Note 27 to the decision of the Court in *U. S. v. Southeastern Underwriters Association* (322 U. S. 533, 547), the Court states:

> "Appraising the Swift & Co. Case, Mr. Chief Justice Taft had this to say:
>
> " 'That case was a milestone in the interpretation of the commerce clause of the Constitution. It recognized the great changes and development in the business of this vast country and drew again the dividing line between interstate and intrastate commerce where the Constitution intended it to be. *It refused to permit local incidents of great interstate movement, which taken alone were intrastate, to characterize the movement as such.* (Italics supplied.) The Swift & Co. Case merely fitted the commerce clause to the real and practical essence of modern business growth.' Board of Trade v. Olsen, 262 U. S. 1, 35, 67 L. ed. 839, 849, 43 S. Ct. 470."

Respondent and the courts below have ignored this judicial "milestone" and have disregarded these "great changes and development in the business of this vast country" and "the real and practical essence of modern business growth." They seek to "permit local incidents of great interstate movement to characterize the movement as intrastate," instead of drawing the line "where the Constitution intended it to be."

Judicial milestones should not be ignored.

3. Paragraphs 1 and 2 of the Sherman Act Have Both a Geographical and Distributive Significance and Apply to Any Part of the United States as Distinguished From the Whole.

The respondent herein and its co-conspirators had a complete monopoly of the sale of sugar beet seed and the refining of sugar beets into sugar in Northern and Central California. During the period covered by the conspiracy no farmer could purchase sugar beet seeds nor sell sugar beets except to one of the conspirators.

In *Indiana Farmers Guide Publishing Co. v. Prairie Farmer Publishing Co.*, 293 U. S. 268, the Circuit Court of Appeals had made the relation between the amount of advertising controlled by respondents and the total in the entire country the basis of its judgment. This the Supreme Court reversed, stating at page 278:

> "But the complaint charges restraint and attempt to monopolize only in the territory served by respondent's publications, being five—or seven . . . out of a total of 23 papers in that territory . . . Its right to recover does not depend upon the proportion that respondents control of the total farm paper advertisements in the entire country, and it was not required to prove that respondents imposed a restraint or attempted monopolization that would affect all commercial advertisements in all farm papers wherever published or circulated. The provisions of §§1 and 2 have both a geographical and distributive significance and apply to any part of the United States as distinguished from the whole and to any part of the classes of things forming a part of interstate commerce."

This rule has been repeatedly applied by the Supreme Court. (*U. S. v. Frankfort Distilleries,* 324 U. S. 293, which involved only Colorado; *Allen Bradley Co. v. Local Union No. 3,* 325 U. S. 797, which involved only New York City; *C. E. Stevens Co. v. Foster & Kleiser,* 311 U. S. 255, which involved the "Pacific Coast region"; *Interstate Circuit v. U. S.,* 306 U. S. 208, which involved only Texas and New Mexico; *Eastman Kodak Co. v. Southern Photo Materials Co.,* 273 U. S. 359, which involved only Georgia; *United States v. Borden,* 308 U. S. 188, which involved Illinois, Indiana, Michigan and Wisconsin, and *American Medical Asso. v. U. S.,* 317 U. S. 519, which involved only the District of Columbia.)

Indiana Farmers Guide Publishing Co. v. Prairie Farmer Publishing Co., 293 U. S. 268, is also significant in view of the contention of respondents herein that no rise in price to the consuming public as such was shown. There was no claim in the *Indiana Farmers Guide Publishing Co.* case that any ultimate consumer or purchaser was affected. The sole claim was that one farm paper was unable to get advertising because its competitors joined in a conspiracy to give *lower prices* to advertising purchasers. Instead of increasing prices to advertising purchasers, prices were decreased.

In *Swift & Co. v. U. S.,* 196 U. S. 375, the Supreme Court pointed out at pages 396, 397:

> "Although the combination alleged embraces restraint and monopoly of trade within a single state, its effect upon commerce among the states is not accidental, secondary, remote, or merely probable."

That quotation is particularly applicable herein.

4 The Courts Below Erred in Holding That the Price-Fixing Monopoly Herein Involved Did Not Come Under the Sherman Act.

The courts below held that the processing of the beets into sugar broke the chain of interstate commerce. This was in error for *any one* of six reasons each of which we shall discuss.

A. The Contract Between the Growers and the Refinery Provided That the Price to Be Paid by the Refinery to the Grower for the Beets Was Fixed by the Returns Secured by the Refinery From the Interstate Sale of the Processed Product. Until the Sugar Was Sold in Interstate Commerce, the Amount to Be Paid the Grower Could Not Be Determined. Therefore, Interstate Commerce Was Involved.

This price provision brought the entire contract into interstate commerce; if it were removed there would be no contract, because there would be no method whatsoever for determining the price to be paid the grower for his beets. Yet the courts below ignored this provision and decided the case as if the contract were one completely carried out within a state with no relationship between the price to be paid the grower and the sale of the processed product in interstate commerce. In so doing the court erred. (*American Tobacco Co. v. U. S.*, 328 U. S. 781; *U. S. v. South-Eastern Underwriters Ass'n.*, 322 U. S. 533, 546; *U. S. v. Frankfort Distilleries*, 324 U. S. 293, 297; *U. S. v. Bausch & Lomb Optical Co.*, 321 U. S. 707, 720; *W. W. Montague & Co. v. Lowry*, 193 U. S. 38.)

B. Under the Contract the Grower Was Really Selling Sugar to the Refinery Because It Was Only the Sugar in the Beets for Which He Was Paid. This Sugar, When Extracted, Was Sold in Interstate Commerce. This Latter Sale Determined the Price Paid the Grower for the Beets. Therefore, Interstate Commerce Was Involved.

The grower was not paid X dollars per ton for his beets—the price paid him was determined by two variables, (a) the sugar content of the beets and (b) the net price received by the refiners from the sale in *interstate commerce* of raw sugar during the crop year.

The true perspective must be drawn from the whole picture, not from an isolated, local transaction. (*U. S. v. General Motors Corporation*, 121 F. (2d) 376, 401; *U. S. v. South-Eastern Underwriters Ass'n.*, 322 U. S. 533, 546; *U. S. v. Bausch & Lomb Optical Co.*, 321 U. S. 707, 720.) All interstate commerce takes place within the confines of the states and necessarily involves incidents occurring within each state through which it passes or with which it is connected. Such incidents taking place within a state cannot be segregated "by an act of mental gymnastics" by labeling them as "separate" or "direct" or "local." (*Nippert v. Richmond*, 327 U. S. 416.)

In *U. S. v. Southeastern Underwriters Assn.*, 322 U. S. 533, 546, the Court held that the "distinction between what has been called 'local' and what 'interstate'" is "a type of mechanical criterion which this Court has not deemed controlling in the measurement of federal power" and said:

> "We may grant that a contract of insurance, considered as a thing apart from negotiation and execution, does not itself constitute interstate commerce.

"But it does not follow from this that the court is powerless to examine the entire transaction, of which that contract is but a part, in order to determine whether there may be a chain of events which becomes interstate commerce. Only by treating the Congressional power over commerce among the states as a 'technical legal conception' rather than as a 'practical one, drawn from the course of business' could such a conclusion be reached . . . . In short, a nation-wide business is not deprived of its interstate character merely because it is built upon sales contracts which are local in nature. Were the rule otherwise, few businesses could be said to be engaged in interstate commerce."

The contract herein was clearly one involving interstate commerce. (*American Tobacco Co. v. U. S.*, 328 U. S. 781; *U. S. v. Frankfort Distilleries*, 324 U. S. 293, 297; *Currin v. Wallace*, 306 U. S. 1; *U. S. v. Rock Royal Coop., Inc.*, 307 U. S. 533; *Walling v. Amidon* (C. C. A. 10), 153 F. (2d) 159; *Fitch v. Kentucky-Tenn. Light & Power Co.* (C. C. A. 6th), 137 Fed. 12; *Armour v. Wantock*, 323 U. S. 126; *Corn Products Refining Co. v. Federal Trade Commission*, 324 U. S. 726; *Roland Elec. Co. v. Walling*, 326 U. S. 657; *Martino v. Michigan Window Cleaning Co.*, 327 U. S. 173; *Borden Co. v. Borella*, 325 U. S. 679; *Boutelle v. Walling*, 327 U. S. 463; *Ramsey v. Associated Billposters of U. S.*, 260 U. S. 501; *U. S. v. Bausch & Lomb Optical Co.*, 321 U. S. 707.) The courts below erred in not so holding.

C. The Complaint Specifically Alleged That the Various Steps Involved in the Production of Beet Sugar, From the Preparation of the Ground for Planting of the Seed to the Sale in Interstate Commerce of the Extracted Sugar, Were "Inextricably Intermingled With and Directly Affected by Each Other" and Were "Part of One Transaction." Therefore, Interstate Commerce Was Involved.

Paragraph 5 of the complaint [T. 70-71] specifically alleged that the various steps involved in the production of beet sugar, from the preparation of the ground for planting to the sale in interstate commerce of the extracted sugar, were inextricably intermingled with and directly affected by each other and were part of one transaction. Since this case involved the granting of a motion to dismiss on the grounds that the complaint did not state facts sufficient to constitute a claim, these allegations must be taken as true. (*Columbia Broadcasting System, Inc. v. U. S.*, 316 U. S. 407, 414.) The Sherman Act therefore applied.

D. Products of the Farm Which Are Subsequently Manufactured or Processed Into Articles of Interstate Commerce Are Within the Reach of the Anti-Trust Act. Price-Fixing Is Illegal Per Se. A Combination Among Interstate Processors Fixing Prices to Be Paid to Local Producers for Their Products Is Reached by the Sherman Act if the Processed Product Is Intended to Cross State Lines.

The District Court's opinion which was adopted by the Circuit Court states that "products of a farm which are subsequently manufactured or processed into articles of commerce are beyond the reach of said (Sherman) Act." This is erroneous.

In *Schulte v. Gangi*, 328 U. S. 108, 120, the court said:

> "We find nothing in the case that lends any support to the suggestion that a manufacturer's intrastate delivery to other manufacturers for further processing for ultimate interstate distribution interrupts production for interstate commerce."

Yet the latter is what the lower courts held.

In *Wickard v. Filburn*, 317 U. S. 111; *Currin v. Wallace*, 306 U. S. 1; *U. S. v. Wrightwood Dairy Co.*, 315 U. S. 110; *American Tobacco Co. v. U. S.*, 328 U. S. 781; *Corn Products Refining Company v. Federal Trade Commission*, 324 U. S. 726, and *Swift & Co. v. U. S.*, 196 U. S. 375, the Supreme Court held that products of a farm that were subsequently manufactured or processed were within the reach of the commerce clause.

The Supreme Court in *Santa Cruz Fruit Packing Co. v. N. L. R. B.*, 303 U. S. 453, 465, said (emphasis added):

> "With respect to the federal power to protect interstate commerce in the commodities produced, there is obviously no difference between coal mined or stone quarried and fruit and *vegetables grown*. The same principle must apply and has been applied to injurious restraints of interstate trade which are caused by the practices of *manufacturers and processors*."

In *Corn Products Refining Co. v. Federal Trade Commission*, 324 U. S. 726, the court said regarding processing of agricultural products, at p. 744 (emphasis added):

> "The evils of the discrimination would seem to be the same whether the *processing* result in little or much alteration in the character of the commodity purchased and resold."

Likewise, the evils of price-fixing and price maintenance are the same whether much, little or no processing takes place.

In *Currin v. Wallace*, 306 U. S. 1, 10; *Mulford v. Smith*, 307 U. S. 38, 47; *U. S. v. Rock Royal Coop., Inc.*, 307 U. S. 533, 568, 569; *Lemke v. Farmers Grain Co.*, 258 U. S. 50, 54, and *Dahnke-Walker Milling Co. v. Bonderant*, 257 U. S. 282, 291, the Court held: "Where commodities are bought for use beyond state lines," the sale is a part of interstate commerce.

American Tobacco Co. v. U. S., 328 U. S. 781, involved the Big Three Tobacco companies (American Tobacco Company, Liggett & Myers Tobacco Company and R. J. Reynolds Tobacco Company). They sold from 70% to 80% of the country's cigarettes, a product manufactured from the tobacco purchased from the growers in "local" auctions. They were accused of conspiring to fix prices and to exclude undesirable competition against them in the purchase of domestic type of flue cured tobacco and burley tobacco, the raw materials essential to the production of cigarettes sold by them. The Supreme Court pointed out the following illegal restraints of trade directed *against the grower:*

(1) The Big Three refused to purchase tobacco on a local market unless all three were present.

(2) One would not participate in new local markets unless the other two were present.

(3) Each placed limitations and restrictions on the prices their buyers were permitted to pay at local auctions and each put on the same ceiling.

(4) Grades used in purchasing on local markets were formulated by the three, which resulted in the absence of competition.

The Big Three of the tobacco industry controlled from 70% to 80% of the cigarette market. The Big Three of the sugar beet industry controlled 100% of the sugar refining industry of Northern and Central California. The tobacco Big Three purchased leaf tobacco which had to be processed into cigarettes. None of the purchased leaf tobacco was sold as such by the Big Three. The sugar beet Big Three purchased sugar beets which had to be processed into sugar. None of the purchased sugar beets were sold as such by this Big Three.

The tobacco Big Three were convicted of violation of the Sherman Act by conspiring to control *local* prices paid to *local* farmers who produced their tobacco *locally* and who sold it *locally* to a purchaser who manufactured it into cigarettes which were sold in interstate commerce. The sugar beet Big Three likewise conspired to control prices paid to *local* farmers who produced their beets *locally* and sold them *locally* to purchasers who manufactured them into sugar sold in interstate commerce. The sugar beet Big Three are also guilty of violating the Sherman Act.

As the Supreme Court said in the tobacco case: "It is not the form of combination but the result to be achieved the statute condemns." The result in each case was the restraint of interstate commerce.

The tobacco case cannot be distinguished from the case at bar and the courts below erred in holding that the products of a farm, which are subsequently processed into articles of commerce, are beyond the reach of the Sherman Act.

The conspirators herein fixed and maintained the prices to be paid the growers. They refused to sell seed

or to take beets from any grower except on the prices and terms the conspirators had agreed upon in advance. The growers could get no seed from any other source and could sell their beets commercially to no one else, because the conspirators had a complete monopoly of sugar beet seeds and of sugar beet refining in Northern and Central California. [T. 72, 73.]

Price fixing and price maintenance combinations, reasonable or unreasonable, are illegal *per se* under the Sherman Act, whether local or wholesale prices are involved. (*U. S. v. Frankfort Distilleries*, 324 U. S. 293, 296; *U. S. v. Socony-Vacuum Oil Co.*, 310 U. S. 150, 212, 213; *U. S. v. Masonite Corp.*, 316 U. S. 265, 274; *U. S. v. Bausch & Lomb Optical Co.*, 321 U. S. 707, 720.)

Nevertheless, the courts below held that the law was not violated, despite the price fixing and price maintenance monopoly, because the purchase of the beets was a "local" affair. This is directly contrary to the holding of the Supreme Court in *U. S. v. Frankfort Distilleries*, 324 U. S. 293, where the court, in discussing the fixing of local prices, said at page 297 (emphasis added):

> "These two questions thus posed relate to the extent of *the Sherman Act's application to trade restraints resulting from actions which take place within a state*. In resolving them, there is an obvious distinction to be drawn between a course of conduct wholly within a state and conduct which is an inseparable element of a larger program dependent for its success upon activity which affects commerce between the state. . . . . The sole ultimate object of

respondent's combination in the instant case was price fixing or price maintenance. And with reference to commercial trade restraints such as these Congress, in passing the Sherman Act, left no area of its constitutional power unoccupied; it 'exercised all the power it possessed.' . . .

"The fact that the ultimate object of the conspiracy charged was the fixing or maintenance of local retail prices, does not of itself remove it from the scope of the Sherman Act; *retail outlets have ordinarily been the object of illegal price maintenance.*"

The Sherman Act has repeatedly been held by the Supreme Court to apply to the fixing of local or retail prices. (*U. S. v. Univis Lens Co.*, 312 U. S. 241, 253; *Ethyl Gasoline Corporation v. U. S.*, 309 U. S. 436; *Dr. Miles Medical Co. v. John D. Park & Sons*, 220 U. S. 373; *U. S. v. Bausch & Lomb Optical Co.*, 321 U. S. 707, 720, and *American Tobacco Co. v. U. S.*, 328 U. S. 781.)

The courts below ignored these cases and applied to the Sherman Act and long discarded mechanical tests of "manufacture," "production" and "local." They erred in so doing.

The conspirators herein had a monopoly of the supply of sugar beet seeds in the area here involved and owned and controlled all the sugar beet refineries. [T. 72, 73.] No farmer could buy sugar beet seeds or dispose of his sugar beets except from or to one of the conspirators upon the terms and conditions and at the price agreed upon in advance by these conspirators. [T. 73.] Whether

the conspiracy be considered as "aimed at restraining or destroying competition, or had as its purpose a restraint of the free availability of 'sugar beet seeds and sugar beet refining' services in the market, the Apex Hosiery Co. case places it within the scope of the statute." (*American Medical Asso. v. U. S.*, 317, 519, 529.) "The fact that the ultimate object of the conspiracy charged was the fixing or maintenance of local retail prices" (paid farmers) "does not of itself remove it from the scope of the Sherman Act." (*U. S. v. Frankfort Distilleries*, 324 U. S. 293, 297.)

E. Plaintiffs' Cause of Action Does Not Depend on Plaintiffs Being Engaged in Interstate Commerce, Because the Price-fixing Acts Complained of Were a Part of the Conspirators' Interstate Commerce.

American Tobacco Co. v. U. S., 328 U. S. 781;

U. S. v. Bausch & Lomb Optical Co., 321 U. S. 707, 720;

U. S. v. Frankfort Distilleries, 324 U. S. 293;

Currin v. Wallace, 306 U. S. 1;

U. S. v. Wrightwood Dairy Co., 315 U. S. 110, 120.

"The Sherman Act denounced every conspiracy in restraint of trade, including those carried on by acts constituting intrastate commerce." *Local 167 v. U. S.* 291 U. S. 293, 297.

"Competitive practices which are wholly intrastate may be reached by the Sherman Act because of their injurious effect on interstate commerce." *U. S. v. Wrightwood Dairy Co.*, 315 U. S. 110, 120.

"Where goods are purchased in one state for transportation to another, the commerce includes the purchase quite as much as it does the transportation."

Currin v. Wallace, 306 U. S. 1, 10;

U. S. v. Rock Royal Coop., Inc., 307 U. S. 533, 568, 569;

Lemke v. Farmers Grain Co., 258 U. S. 50, 54;

Dahnke-Walker Milling Co. v. Bonderant, 275 U. S. 282, 291.

Congressional power over interstate commerce reaches back to the steps prior to transportation in interstate commerce. *U. S. v. Darby*, 312 U. S. 100, 117.

"Congressional authority to protect interstate commerce is not limited to transactions which can be termed an essential part of a flow of interstate or foreign commerce." *Cloverleaf Butter Co. v. Patterson*, 315 U. S. 148, 154.

Activities intrastate in character, when separately considered, come under the Commerce Clause if they have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions. (*N. L. R. B. v. Jones & Laughlin Steel Corp.*, 301 U. S. 1, 36, 37; *Santa Cruz Fruit Packing Co. v. N. L. R. B.*, 303 U. S. 453, 465, 466; *U. S. v. Darby*, 312 U. S. 100, 122; *Wickard v. Filburn*, 317 U. S. 111; *Ramsay v. Associated Billposters*, 260 U. S. 501.)

Most interstate commerce takes place within the confines of the states and necessarily involves incidents occurring within each state through which it passes or with which it is connected in fact. Such incidents cannot be

segregated by an act of mental gymnastics by labeling them as "separate and distinct" or "local." *Nippert v. Richmond*, 327 U. S. 416.

In *Ramsay v. Associated Billposters of U. S.*, 260 U. S. 501 (Jan. 2, 1923), the court stated at p. 511:

> "The court below held: 'The business of the solicitors is to send their customers advertisements to be posted on billboards in various towns and cities throughout the country. Assuming that this business is, as between them and their customers, interstate commerce, we are clear that after the posters have arrived at destination, the posting of them by the billposters is a purely local service, not directly affecting, but merely incidental to, interstate commerce. We think this follows from the decision of the Supreme Court in Hopkins v. United States, 171 U. S. 578, 43 L. ed. 290, 19 Sup. Ct. Rep. 40.'
>
> "We cannot accept this view. The alleged combination is nation-wide; members of the Association are bound by agreement to pursue a certain course of business, designed and probably adequate materially to interfere with the free flow of commerce among the states and with Canada. As a direct result of the defendants' joint acts, plaintiff's interstate and foreign business has been greatly limited or destroyed. Hopkins v. United States is not applicable. There the holding was that the rules, regulations, and practices of the association directly affected local business only. The purpose of the combination here challenged is to destroy competition and secure a monopoly by limiting and restricting commerce in posters to channels dictated by the confederates, to exclude from such trade the undesired, including the plaintiffs, and to enrich the members by demanding

noncompetitive prices. The allegations clearly show the result has been as designed,—that the statute has been violated and plaintiff's business has suffered."

The Court, after citing numerous cases, stated at p. 512:

"The fundamental purpose of the Sherman Act was to secure equality of opportunity and to protect the public against evils commonly incident to destruction of competition through monopolies and combinations in restraint of trade. The alleged actions of defendants are directly opposed to this beneficent purpose and are denounced by the statute.

"We find no adequate support for the claim that plaintiffs were parties to the combination of which they now complain."

"Reversed."

The reasoning of the lower courts herein is the same as the reasoning of the lower court in the *Ramsay* case. Both erred.

F. If Respondent Refiner Had Itself Grown the Beets Besides Refining Them and Selling the Sugar, Each Step Would Have Been Part of the Stream of Interstate Commerce. This Stream Was Not Broken Because an Independent Contractor Performed Some of the Steps.

In *Martino v. Michigan Window Cleaning Co.*, 327 U. S. 173, the Court said:

"If the services rendered in this case had been rendered by employees of respondent's customers engaged in the production of goods for interstate commerce, those employees would have come under the Act." (The Fair Labor Standards Act of 1938.) "Respondent's employees are not to be excluded from

such coverage merely because their employment to do the same work was under independent contracts. *A. B. Kirschbaum Co. v. Walling*, 316 U. S. 517; *Warren-Bradshaw Drilling Co. v. Hall*, 317 U. S. 88, 90."

See also:

Walling v. Amidon (C. C. A. 10th), 153 F. (2d) 159, 161.

Roland Electric Co. v. Walling, 326 U. S. 657, involved a Maryland corporation doing business only in Maryland in wiring and installing motors for industrial uses engaged in interstate commerce. The Supreme Court pointed out that if Roland Electric had not done the work, the industrial users would have had to do it themselves, and therefore Roland Electric was engaged in "the production of goods for commerce."

So, here, if plaintiffs had not planted the seed (bought from respondent), raised the beets, and delivered them to respondent to be processed into sugar to be sold in interstate commerce, respondents would have had to do those acts themselves. Therefore, plaintiffs were engaged "in production of goods for commerce," and the Sherman Act applied.

5. The Courts Below Erroneously Held That Appellants, Although Damaged by the Price-Fixing Conspiracy Could Not Recover Because Some Other Farmers Were Not Damaged to the Same Extent.

The District Court in its Opinion stated:

> "From the complaint it appears that the net result of the conspiracy was that all growers in said area received the same price for their sugar beets and while the plaintiffs may have suffered a detriment, growers delivering their beets to other sugar refineries received an advantage."

There is no basis in the record for this statement.

It is true that the result of the conspiracy was that all growers in the district received the same price for the same product, *regardless of with which refinery they dealt.* That alone rendered the combination illegal. But that does not mean that certain growers received more than they would otherwise have received. All growers, as a result of the conspiracy, lost the advantages of competition because the refineries "no longer competed with any of the other manufacturers . . . as to efficiency of sales or manufacturing organizations" [Comp., Par. IX-c, T. 76-77]. "Defendant as a result of said conspiracy did not during said crop season of 1939, 1940 or 1941 conduct its interstate operations in as efficient and careful manner as it had prior thereto (when there was no conspiracy but there was competition between itself and the other manufacturers) or in as efficient or careful a manner as it

would have, had said conspiracy not existed." [Comp., Par. XI, T. 78-79.]

This meant that all growers were damaged by the conspiracy but that plaintiffs and the other growers who dealt with the most efficient of the three conspirators were damaged more than the rest, because they lost not only the advantage of competition but also the advantage of dealing with the most efficient of the three conspirators.

But even if some growers who dealt with one of the other conspirators received more for their sugar as a result of the price-fixing conspiracy than they otherwise would have received, the injury done plaintiffs and the other farmers who dealt with defendant is not excused. If it were, then price-fixing conspirators could with immunity injure or even wipe out one group after another as long as all groups were not affected at once.

Price-fixing agreements are illegal *per se*, and "it is no excuse for monopolizing a market that the monopoly has not been used to extract from the consumer more than a fair profit." (*U. S. v. Aluminum Co. of America*, 148 F. (2d) 416.)

In *American Tobacco Co. v. U. S.*, 328 U. S. 781, the Court stated:

> "The authorities support the view that the material consideration in determining whether a monopoly exists is not that prices are raised or that competition actually is excluded but that power exists to raise prices or to exclude competition when it is desired to do so."

Frequently conspirators have claimed that their conspiracy to restrain prices was justified because of the

economic good the conspiracy achieved but just as frequently the Supreme Court has ruled that price-fixing agreements are illegal *per se* and that good motives or economic results are immaterial. (*U. S. v. Socony-Vacuum Oil Co.*, 310 U. S. 150, 212, 213.) Price-fixing, reasonable or unreasonable, is unlawful *per se*." (*U. S. v. Bausch & Lomb Optical Co.*, 321 U. S. 707, 720.)

6. Trade Includes Both Buying and Selling. It Is No Excuse for Monopoly That Prices Are Not Raised to the Ultimate Consumer. The Sherman Act Protects Buyers and Sellers, Consumers and Producers, Not Merely Consumers and Buyers as Respondent Contends.

In *Sugar Institute of America v. U. S.*, 297 U. S. 553, the importance of the sugar beet industry in this country was stressed. The Court stated at page 572:

> "Beet sugar for many years has been an important factor in the domestic market. It is produced and sold chiefly in the middle and far West, providing in some States over 65 per cent. of the supply, and it competes with other sugars in the number of Southern and Middle Atlantic States."

At page 573 the Court stated:

> "In sales by refiners to manufacturers of products containing sugar—about one-third of the sugar consumed—'price, not brand, was always the vital consideration.'"

The various sugar refineries involved in that case had combined to eliminate and suppress price competition between themselves as to the price at which they would sell refined sugar, and to maintain relatively high prices for

refined sugar as compared to the prices for raw sugar and to limit and suppress numerous contract terms and conditions involved in the sale of refined sugar. By the 1930 decree of the Supreme Court they were enjoined from proceedng further with this conspiracy.

The refineries involved in the 1930 case were foiled by that decree in their endeavor to gouge *the consumer* of sugar and thus illegally enrich themselves. Nevertheless, all the beet sugar refineries of Northern and Central California in 1937 or 1938 organized the conspiracy herein involved to suppress competition at the *beginning* rather than at the *end* of the interstate journey by fixing the price to be paid the *producer* of the sugar beets and by monopolizing the industry as to him in the area here involved.

Faced with the decree in the *Sugar Institute* case, the respondent herein has raised the defense that the Sherman Act only protects buyers or consumers and not sellers or producers.

But the Supreme Court in the *Sugar Institute* case stated at page 600:

> "We have said that the Sherman Act, as a charter of freedom, has a generality and adaptability comparable to that found to be desirable in constitutional provisions. It does not go into detailed definitions. Thus in applying its broad prohibitions, each case demands a close scrutiny of its own facts. Questions of reasonableness are necessarily questions of relation and degree. In the instant case, a fact of outstanding importance is the relative position of defendants in the sugar industry. We have noted that the fifteen refiners, represented in the Institute, refine practically all the imported raw sugar processed in

this country. They supply from 70 to 80 per cent. of the sugar consumed . . . Another outstanding fact is that defendants' product is a thoroughly standardized commodity. In their competition, price, rather than brand, is generally the vital consideration. The question of unreasonable restraint of competition thus relates in the main to competition in prices, terms and conditions of sales. The fact that, because sugar is a standardized commodity, there is a strong tendency to uniformity of price, makes it the more important that such opportunities as may exist for fair competition should not be impaired."

There the conspirators controlled from 70 to 80% of the raw sugar processed in this country.

Here the conspirators controlled 100% of the sugar beet seed supply and 100% of the sugar beet refineries in Northern and Central California. The sugar that they produced is the same "thoroughly standardized commodity" as was involved in the *Sugar Institute* case. "Price, rather than brand" is still the same "vital consideration." Prior to 1939 there was competition among the refineries in prices, terms and conditions of sale with producers but as a result of the conspiracy herein such competition ceased and the conspirators, through their 100% monopoly, fixed and maintained prices, terms and conditions of sale. [Comp. par. X, T. 77-78.]

Respondents contend that the Sherman Act protects buyers or consumers and not sellers or producers. That position is not well founded. The Sherman Act "as a charter of freedom has a generality and adaptability comparable to that found to be desirable in constitutional provisions." (*Sugar Institute of America v. U. S.*, 297 U. S. 553.) It is not a "charter of freedom" merely for

buyers or consumers; it is a "charter of freedom" for everyone. It protects not only the housewife who buys the manufactured sugar, but also the farmer who produces the sugar beets. It protects not only John Doe Citizen who buys a cigarette, but also Richard Roe Farmer who produces the tobacco from which the cigarette was made. (*American Tobacco Co. v. U. S.*, 328 U. S. 781.) It protects not only the housewife who buys ham, bacon, beef or mutton at the butcher shop to serve on her family table, but also the cattle raiser who raises the cattle from which the meat was processed. (*Swift & Co. v. U. S.*, 196 U. S. 375; *U. S. v. Swift & Co.*, 286 U. S. 105.) It protects not only the child who pays his nickel or dime for an ice cream cone but also the farmer whose cow gave the cream that was processed into that ice cream. (*U. S. v. Borden*, 308 U. S. 188; *U. S. v. Rock Royal Coop., Inc.*, 307 U. S. 533; *U. S. v. Wrightwood Dairy Co.*, 315 U. S. 110) It protects everyone.

In *Montrose Lumber Co. v. U. S.* (C. C. A. 10th, 1941), 24 F. (2d) 573, the Court said:

> "It is true that in most cases of monopoly of trade, sellers and not buyers, are the actors. However, Sec. 2 of the Sherman Act embraces monopolies of trade and commerce among the several states by whomsoever effected.' (577) ". . . Trade necessarily involves both buying and selling and the control of either monopolizes trade." (p. 578.)

In *White Bear Theatre Corp. v. State Theatre Corp.* (C. C. A. 8, 1942), 129 F. (2d) 600, the court said (p. 604):

> "The competitive freedom of such markets in both buying and selling, is one of the principal things which the Sherman Act was intended to protect."

American Tobacco Co. v. U. S., 328 U. S. 781, involved a conspiracy to monopolize the market of the unprocessed farm product (leaf tobacco) and also to monopolize the market in the processed product (the cigarette).

"The conspiracy" in the *Tobacco* case was one "to fix and control prices and other material conditions relating to the purchase of raw material in the form of leaf tobacco for use in the manufacture of cigarettes. It also appears to have been one to fix and control prices and other material conditions relating to the distribution and sale of the product of such tobacco in the form of cigarettes. The jury found a conspiracy to monopolize to a substantial degree the leaf market and the cigarette market. . . . The verdicts show that the jury found that the petitioners conspired to fix prices and to exclude undesired competition against them in the purchase of the domestic type of flue-cured tobacco and of burley tobacco. . . . These are raw materials essential to the production of cigarettes of the grade sold by the petitioners . . . ." (P. 798.)

This is the very type of conspiracy of which respondent herein has been guilty. A conspiracy to fix prices and exclude competition in the purchase at local sales from the farmers of the raw materials essential to the production of cigarettes is a violation of the Sherman Act. So, therefore, is a conspiracy to fix prices and exclude competition in the purchase of the raw material essential to the production of sugar.

Local 167 v. U. S., 291 U. S. 293, involved a conspiracy to monopolize and restrain interstate commerce in live and freshly drawn poultry, in violation of paragraphs 1 and 2 of the Sherman Act. In that case, as at the case at bar,

defendants contended that there was no proof that they intended to restrain or did interfere with interstate commerce. The court held at p. 297 that there was no merit in such contention and said:

> "We need not decide when interstate commerce and that which is intra-state begins. The control of the handling, the sales and the prices at the place of origin before the interstate journey begins or in the State of destination where the interstate movement ends may operate directly to restrain and monopolize interstate commerce."

The court further stated at p. 297:

> "The Sherman Act denounces every conspiracy in restraint of trade including those that are to be carried on by acts constituting intrastate transactions."

At pp. 299 and 300:

> "And, maintaining that interstate commerce ended with the sales by receivers to marketmen, appellants insist that the injunction should only prevent acts that restrain commerce up to that point. But intrastate acts will be enjoined whenever necessary or appropriate for the protection of interstate commerce against any restraint denounced by the Act."

The decision in *U. S. v. Aluminum Co. of America*, 148 F. (2d) 416, which has, in effect, been adopted by the Supreme Court as its own decision, stated:

> "It is no excuse for 'monopolizing' a market that the monopoly has not been used to extract from the consumer more than a 'fair' profit."

At page 445, the court stated:

> "There remains only the question whether this assumed restriction had any influence upon prices . . . To that *Socony-Vacuum Oil Co. v. United States*, 310 U. S. 150, 84 L. Ed. 1129, is an entire answer. It will be remembered that, when the defendants in that case protested that the prosecution had not proved that the 'distress' gasoline had affected prices, the court answered that that was not necessary, because an agreement to withdraw any substantial part of the supply from a market would, if carried out, have some effect upon prices, and was as unlawful as an agreement expressly to fix prices. The underlying doctrine was that all factors which contribute to determine prices, must be kept free to operate unhampered by agreements."

This decision in the *Aluminum* case is referred to by the Supreme Court in *American Tobacco Co. v. U. S.* (June 10, 1946), 328 U. S. 781, as a case decided "under unique circumstances which add to its weight as a precedent."

Paraphrasing the Circuit Court of Appeals for the Sixth Circuit, in *Fitch v. Kentucky-Tennessee Light and Power Co.*, 136 F. (2d) 12, we can say:

> "Obviously the price of the" (sugar beets) "directly affected the prices charged the consumers for" (raw sugar) "in various states."

In that case the coal produced by an intrastate operator and sold by him by local sales to be used to manufacture

power, was held to be as much an element of the power as though it were a constituent part thereof—yet here the sugar in the beet, which was a constituent element of the processed sugar, was held not to be included within the interstate commerce of which the sugar was a part. In *Walling v. Amidon,* (C. C. A. 10th), 153 F. (2d) 159, the intrastate producer of sand used to line troughs which carried molten metal to the furnaces of an interstate steel producer, was held to be the producer of goods for commerce. Yet here the production of sugar beets from which the interstate commodity sugar was extracted was held to be a local product, not reached by the Commerce Clause.

U. S. v. Rock Royal Coop., Inc., 307 U. S. 533, involved the prices to be paid to a dairy farmer who delivered his milk to a plant within the state of production of the milk. This "local transaction" was held to be part of interstate commerce.

In *U. S. v. Borden,* 308 U. S. 188 the first count charged a conspiracy to fix, maintain and control prices to be paid *producers* for milk, and the second count charged a conspiracy to fix and maintain prices to *consumers* for the sale of the milk. The Supreme Court held that *both* counts stated a cause of action. If it is a violation of the Sherman Act to conspire to fix, maintain and control prices to be paid for raw milk, it is also a violation of the Sherman Act to conspire to fix, maintain and control prices to be paid producers for sugar beets.

In *U. S. v. Socony-Vacuum Oil Co.*, 310 U. S. 150, 222, the Court said (emphasis added):

"An agreement to *pay* or charge rigid, uniform prices would be an illegal agreement under the Sherman Act. But so would agreements to raise or lower prices whatever machinery for price-fixing was used. . . . Hence, prices are fixed within the meaning of the Trenton Potteries Co. Case if the range within which *purchases* or sales will be made is agreed upon, if the prices *paid* or charged are to be at a certain level or on ascending or descending scales, if they are to be uniform, or if by various formulae they are related to the market prices. They are fixed because they are agreed upon." (Emphasis added.)

"Any combination which tampers with price structures is engaged in an unlawful activity. . . . The Act places *all* such schemes beyond the pale and protects that vital part of our economy against any degree of interference. Congress has not left with us the determination of whether or not particular price-fixing schemes are wise or unwise, healthy or destructive." (Emphasis added.) *Idem.*, p. 221.

"Proof that a combination was formed for the purpose of fixing prices and that it caused them to be fixed or contributed to that result is proof of the completion of a price-fixing conspiracy under Sec. 1 of the Act." *Idem.*, p. 223.

In *U. S. v. American Tobacco Co.*, 221 U. S. 106, defendants were charged with conspiring together in con-

nection with the "*purchasing* of leaf tobacco" and in connection with "selling and distributing its manufactured output" and with forming an agreement or combination "intended to destroy competition . . . . in reference to such *purchases* or sales." (Emphasis added.)

In *Swift & Co. v. U. S.*, 375, the defendants had agreed not to bid against each other in the livestock market of different states, to bid up prices for a few days in order to induce the cattle men to send their stock to the stockyards, and to fix the prices at which they would sell. The Supreme Court sustained a conviction on both elements of the conspiracy—buying and selling.

In *Dahnke-Walker Milling Co. v. Bondurant*, 257 U. S. 282, it was contended, as respondent contends here, that "local" buying was not part of interstate commerce; but the Supreme Court there stated, at p. 291 (emphasis added):

> "On the same principle, where goods are purchased in one state for transportation to another, the commerce includes the *purchase* quite as much as it does the transportation. . . . '*Buying* and selling and the transportation incidental thereto constitute commerce' . . . 'contracts to *buy*, sell, or exchange goods to be transported among the several states' were declared 'part of interstate trade or commerce.' . . . *In no case has the court made any distinction between buying and selling*, or between *buying* for transportation to another state and transporting for sale in another state. Quite to the contrary, the import of the decisions has been that *if the transportation was incidental to buying or selling, it was not material whether it came first or last.*"

Respondent admits that if price-fixing was of the price *at destination,* there would be a violation of the Sherman Act, but argue that fixing of prices *at point or origin* does not violate the Act. (Brief in Opposition to Petition for Writ of Certiorari, p. 15.) Such, however, is not the law, because it is not material whether the physical transportation across the State line came first or last.

In *U. S. A. v. American Livestock Commission Co.,* 279 U. S. 435, it was held that interstate commerce included buying as well as selling. The Supreme Court there upheld an order by the Secretary of Agriculture requiring the defendants to discontinue a boycott by which they refused to buy livestock from a cooperative association.

In *Standard Oil Co. v. U. S.,* 283 U. S. 163, the Court stated at p. 169 (emphasis added):

> "Moreover, while manufacture is not interstate commerce, agreements concerning it tend to limit the supply or to fix the price of goods *entering* into interstate commerce, or which have been executed for that purpose, are within the prohibitions of the Act. . . . And pooling arrangements may obviously result in restricting competition."

The Sherman Act is a "Charter of Freedom" for all. (*Sugar Institute v. U. S.,* 297 U. S. 553, 600), and it is not to be restricted, as respondents contend, to buyers or consumers. Sellers and producers are also protected by it.

7. The District Court Relied Upon the 1886 Decision of Coe v. Errol (a Tax Case) and Upon Cases Following Coe v. Errol, in Holding That Production and Manufacture of Goods Is Not Commerce. Coe v. Errol Is No Longer Any Authority on Cases Arising Under the Sherman Act. The Circuit Court of Appeals Stated: "We Do Not Approve the Citation of Tax Cases as Authority for Any Issue in This Case." But the Remaining Cases Cited by the District Court (and Approved by the Circuit Court of Appeals) Are, With One Exception, Cases That Rely Upon the Tax Case of Coe v. Errol. The Exception Is Parker v. Brown, Which Supports Appellants' and Not Respondent's Position. As a Result, the Decision of the Circuit Court of Appeals Has No Foundation of Authority Whatsoever.

The Opinion of the Circuit Court stated:

> "We have carefully examined the opinion (of the District Judge) and approve it except in the instances hereinafter set forth. We do not approve the citation of tax cases as authority for any issue in the case, although their citation presents no inconsistency in the opinion."

The opinion of the District Court cited *Coe v. Errol*, 116 U. S. 517; *Crescent Cotton Oil Co. v. State of Mississippi*, 257 U. S. 129; *Dothan Oil Mill Co. v. Espy*, 220 Ala. 605, 127 So. 178; *Utah-Idaho Sugar Co. v. Federal Trade Commission*, 22 F. (2d) 122, 125, and *Parker v. Brown*, 317 U. S. 341, 361.

Coe v. Errol, the case primarily relied upon by the District Court, is a tax case and therefore was not approved by the Circuit Court of Appeals. It was decided

in 1886 and sets forth the law as to the power of a State to tax personal property that has not passed across the State line. Subsequent Supreme Court decisions have limited the effect of this case to situations involving local taxation or regulation and have held that the statements made therein do not apply to cases under the Sherman Act or the National Labor Relations Board Act (*Stafford v. Wallace*, 258 U. S. 495, 525; *Santa Cruz Fruit Packing Co. v. N. L. R. B.*, 303 U. S. 453, 466. *Coe v. Errol* was cited by the majority in *Carter v. Carter Coal Co.*, 298 U. S. 238, with Justices Cardoza, Brandeis and Stone dissenting, but the Supreme Court subsequently held that *Carter v. Carter Coal Co.* does not state the law in so far as the Sherman Act and the N. L. R .B. Act are concerned. *N. L. R. B. v. Jones & Laughlin Steel Corp.*, 301 U. S. 1; *Sunshine Anthracite Coal Co. v. Adkins*, 310 U. S. 381; *U. S. v. Darby*, 312 U. S. 100, 122. See discussion in *Hamlet Ice Co. v. Fleming* (C. C. A. 4th), 127 F. (2d) 165, 169.)

The Circuit Court of Appeals specifically stated: "We do not approve the citation of tax cases as authority for any issue in the case" and yet, out of five cases cited by the District Court on interstate commerce, one of them was a tax case, three of them relied upon that tax case and only one; *Parker v. Brown*, 317 U. S. 341, did not. *Parker v. Brown*, however, is of no benefit whatsoever to respondent. It involved the California Raisin Prorate Program. The Supreme Court, in deciding the case, assumed "for present purposes that the California Prorate Program would violate the Sherman Act if it were organized and made effective solely by virtue of a contract, combination or conspiracy of private persons,

. . ." (p. 350), *Parker v. Brown* cited the *Crescent Cotton Oil Co.* case, at p. 360, as an example of the cases holding *"that for purposes of local taxation or regulation,* manufacture is not interstate commerce even though the manufacturing process is of slight extent." . . . "But courts are not confined to so mechanical a test" (p. 362), and limited such cases to situations involving local taxation or regulation in matters involving the safety, health and well-being of local communities. Yet the courts below erroneously applied cases involving local taxation and regulation to the Sherman Act.

The opinion of the Circuit Courts of Appeals, therefore, stands in the paradoxical position of holding that tax cases are not "authority for issues in this case" and at the same time relying entirely upon cases which in turn rely upon those very tax cases!

Crescent Cotton Oil Co. v. v. State of Mississippi was a 1921 decision which relied primarily on *Coe v. Errol* and laid down the rule "that manufacture is not commerce and the fact that an article is intended for export to another state does not render it an article of interstate commerce."

This 1921 rule is not the law today and it has been specifically repudiated by the U. S. Supreme Court in *United States v. Southeastern Underwriters Assn.,* 322 U. S. 533, 546; *Wickard v. Filburn,* 317 U. S. 111; *U. S. v. Wrightwood Dairy Co.,* 315 U. S. 110; *Corn Products Refining Co. v. Federal Trade Commission,* 324 U. S. 726; *U. S. v. Darby,* 312 U. S. 100; *U. S. v. Rock Royal Coop., Inc.,* 307 U. S. 533; *Currin v. Wallace,* 306 U. S. 1, 12; *Mulford v. Smith,* 307 U. S. 38, 47, etc. *Wickard v. Filburn,* held that the "mechanical application of legal

formulas" (such as set forth in the cases cited by the District Judge) is "no longer feasible" (p. 124), and that the "few dicta and decisions of this Court which might be understood to lay it down that activities such as 'production,' 'manufacturing' and 'mining' are strictly local and . . . . cannot be regulated under the commerce power . . . are not the law today." But the Circuit Court, by adopting the decision of the District Court has held that such dicta and decisions are the law today in the Ninth Circuit!

Wickard v. Filburn also said: "Whether the subject of the regulation in question was 'production,' 'consumption' or 'marketing' is, therefore, not material for purposes of deciding the question of Federal power." *The very question that the Supreme Court held "not material for purposes of deciding the question of Federal power" was the very one used by the courts below for deciding the question.*

Dothan Oil Mill Co. v. Espy, 220 Ala. 605, 127 So. 178, cited by the District Court, is another of the earlier cases applying the *Coe v. Errol* doctrine of the tax cases. In that case certain cotton ginners were charged in the state court in 1938 with conspiracy to restrain trade. The defendants seeking to avoid liability claimed that the matter came within the exclusive jurisdiction of the Federal Trade Commission. The Alabama Court upheld the state's jurisdiction. If that case is authority for the proposition that the Federal courts did not have jurisdiction over the facts therein set forth, then it is contrary to *Wickard v. Filburn*, 317 U. S. 111; *U. S. v. Wrightwood Dairy Co.*, 315 U. S. 100; *Currin v. Wallace*, 306 U. S. 1; *American Tobacco Co. v. U. S.*, 328 U. S. 781, and numerous other cases we have cited.

The District Court cited *Utah-Idaho Sugar Co. v. Federal Trade Commission*, 22 F. (2d) 122. This was decided in 1927 and applied the now discarded dogma "that production and manufacture is not commerce" and held that "only such acts as directly interfere with commerce come under Federal jurisdiction." The first case cited in the *Utah-Idaho Sugar Co.* case was the tax case of *Coe. v. Errol*, which, as we have shown, is not applicable to Sherman Act cases. The *Utah-Idaho Sugar Co.* case is not the law today. In *Corn Products Refining Co. v. Federal Trade Commission*, 324 U. S. 726, the Supreme Court specifically held that the intrastate sale of dextrose used to manufacture candy was subject to the Federal Trade Commission Act where the dextrose was used to manufacture candy sold in interstate commerce. This case and *U. S. v. Darby*, 312 U. S. 100, have in effect overruled the doctrine of the *Utah-Idaho Sugar Co.* case.

Winslow v. Federal Trade Commission (C. C. A. 4th), 277 Fed. 206, was another Circuit Court of Appeals case which had followed the tax cases and reached the same result as did the Court in the *Utah-Idaho Sugar Co.* case and the Courts below. But in a later decision of the Fourth Circuit (*Hamlet Ice Co. v. Fleming*, 127 F. (2d) 165), the Court pointed out at page 169 that *U. S. v. Darby*, 312 U. S. 100, had changed the law as expressed in the *Winslow* case by extending the application of the Commerce Clause to intrastate activities which affected interstate commerce.

Respondents in their Brief in Opposition to Petition for Writ of Certiorari contend that "production and manufacture of goods or commodities is not commerce within the Sherman Act," citing *United Mine Workers*

of America v. Coronado Coal Co., 259 U. S. 344, *United Leather Workers International Union v. Herkert and Meisel Trunk Co.*, 265 U. S. 457, *Industrial Association v. U. S.*, 268 U. S. 64, and *Coronado Coal Co. v. United Mine Workers*, 268 U. S. 295, the most recent of which was decided in 1925.

The Supreme Court since 1925 has repeatedly repudiated this rule. *U. S. v. Frankfort Distilleries*, 324 U. S. 293, 297; *Wickard v. Filburn*, 317 U. S. 111, 120-125; *U. S. v. Wrightwood Dairy Co.*, 315 U. S. 110, 118-121; *Corn Products Refining Co. v. Federal Trade Commission*, 324 U. S. 726; *U. S. v. Darby*, 312 U. S. 100, 118-123; *U. S. v. Rock Royal Coop., Inc.*, 307 U. S. 533, 568-569; *Currin v. Wallace*, 306 U. S. 1, 10-13; *Mulford v. Smith*, 307 U. S. 38, 48; *Parker v. Brown*, 317 U. S. 341, 362; *U. S. v. Southeastern Underwriters Assn.*, 322 U. S. 533.

The cases cited by respondent herein were likewise cited by the respondents in *U. S. v. Frankfort Distilleries, Inc.*, 324 U. S. 293, a Sherman Act case. There the Supreme Court stated:

> "It is true that this Court has on occasion determined that local conduct could be insulated from the operation of the Anti-Trust laws on the basis of the purely local aims of a combination, insofar as those aims were not motivated by the purpose of restraining commerce, and where the means used to achieve the purpose did not directly touch upon interstate commerce. The cases relied upon by respondents fall within this category. All of them involved the application of the Anti-Trust laws to combinations of businessmen or workers in labor disputes, and not to interstate commercial transactions. On the other

hand, the sole ultimate object of respondent's combination in the instant case was price fixing or price maintenance. And with reference to commercial trade restraints such as these, Congress, in passing the Sherman Act, left no area of its constitutional power unoccupied; it 'exercised all the power it possessed.'"

Inasmuch as cases referred to by the Supreme Court in the *Frankfort Distilleries, Inc.* case (note 2 of the Opinion) are the same cases that are relied upon by respondents herein, it is evident that the *Frankfort Distilleries, Inc.* case is a complete answer to respondents' contention.

The attorneys for respondents in *C. E. Stevens v. Foster & Kleiser Co.*, 311 U. S. 252, likewise cited in their brief three of the four Supreme Court decisions cited at p. 8 of Respondents' Brief in Opposition to Writ of Certiorari, as authority that "production and manufacture of goods or commodities is not commerce" but the Supreme Court reversed the Circuit Court of Appeals which had sustained the actions of the District Court in dismissing the amended complaint.

The mechanical tests relied upon in cases involving local taxation and regulation are not applicable in Sherman Act cases and the lower court erred in applying them.

Respondent insists that interstate commerce is not involved in the purchase of sugar beets by the refinery for processing into sugar to be sold in interstate commerce under a contract where the price paid for the sugar beets is determined by the price received by the refinery for the processed sugar. A like contention was made in

Currin v. Wallace, 306 U. S. 1, involving the Tobacco Inspection Act, where Federal inspection was upheld of the unprocessed tobacco before it was even sold in local markets. There the Supreme Court stated at p. 10:

> "Where goods are purchased in one state for transportation to another, the commerce includes the purchase as much as it does the transportation . . . . There is no permissible constitutional theory which would apply this principle to purchases of livestock as in the Swift and Stafford cases and of grain as in the Lemke and Shafer cases, and deny its application to tobacco."

Likewise, there is no permissible constitutional theory which would deny its application to sugar or sugar beets. Even the local marketing of a farm product that never crosses state lines in original or processed form comes under the commerce clause if it might affect the interstate marketing of like products. (*U. S. v. Wrightwood Dairy Co.*, 315 U. S. 110, 120; *Wickard v. Filburn*, 317 U. S. 111.) So sugar beets which cross state lines in processed form come under the Commerce clause.

8.—Public Interest Is Involved.

Respondents erroneously contend that no public interest is involved. The Supreme Court stated in *Paramount Famous Lasky Corp. v. United States*, 282 U. S. 30 at 44:

> "The interest of the public in the preservation of competition is of primary consideration."

The American public certainly is interested in preserving competition among the buyers of sugar beets just as much as it is interested in preserving competition in News Service, (*Associated Press v. U. S.*, 326 U. S.

1), Multifocal Lenses (*U. S. v. Univis Lens*, 316 U. S. 241), Electrical Equipment, (*Allen Bradley Co. v. Local Union No. 3*, 325 U. S. 797), Electrical Transformers, (*Sola Electric Co. v. Jefferson Elec. Co.*, 317 U. S. 173), Photographic Materials, (*Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U. S. 359), Group Health Service, (*American Medical Asso. v. U. S.*, 317 U. S. 519), Hardboard, (*U. S. v. Masonite Corp.*, 316 U. S. 265), Sign-Boards, (*C. E. Stevens Co. v. Foster & Kleiser*, 311 U. S. 255), (*Ramsay v. Associated Billposters*, 260 U. S. 501), Milk, (*U. S. v. Borden*, 308 U. S. 188), Gasoline & Oil, (*Standard Oil Co. v. U. S.*, 283 U. S. 163, *Ethyl Gasoline Corp. v. U. S. A.*, 309 U. S. 436; *U. S. v. Socony-Vacuum Oil Co.*, 310 U. S. 150), Motion Pictures, (*Interstate Circuit v. U. S. A.*, 306 U. S. 208; *U. S. v. Crescent Amusement Co.*, 323 U. S. 173; *Paramount Famous Lasky Corp. v. U. S.*, 282 U. S. 30), Livestock, (*Swift & Co. v. U. S.*, 196 U. S. 375), *U. S. v. Swift & Co.*, 286 U. S. 105), Tobacco, (*U. S. A. v. American Tobacco Co.*, 221 U. S. 106; *American Tobacco v. U. S.*, 328 U. S. 781), Tabulating Cards for Business Machines, (*International Business Machines Corp. v. U. S.*, 298 U. S. 131), Poultry, (*Local 167 v. U. S.*, 291 U. S. 293), Paper, (*Story Parchment Co. v. Patterson Paper Co.*, 282 U. S. 555), Glassware Machinery, (*Hartford Empire Co. v. U. S. A.*, 323 U. S. 36), Retail Liquor, (*U. S. v. Frankfort Distilleries, Inc.*, 324 U. S. 293), Tiles, (*W. W. Montague Co. v. Lowry*, 193 U. S. 38), Enameled Ironware, (*Standard Sanitary Mfg. Co. v. U. S.*, 226 U. S. 20), Lumber, (*Eastern States Retail Lumber Dealers Asso. v. U. S.*, 234 U. S. 600, (*American Column & Lumber Co. v. U. S.*, 257 U. S. 377), Cast Iron Pipe, (*Addyston Pipe and Steel*

Co. v. U. S., 175 U. S. 211, (*Chattanooga Foundry v. Atlanta*, 203 U. S. 390), Linseed Oil, (*U. S. v. American Linseed Oil Co.*, 262 U. S. 371), and Farm Paper Advertising, (*Indiana Farmers Guide Publishing Co. v. Prairie Farmer Pub. Co.*, 293 U. S. 268).

As we have pointed out, price fixing or maintenance agreements are invalid *per se* under the Sherman Act. (*U. S. v. Frankfort Distilleries*, 324 U. S. 393, 396; *U. S. v. Socony-Vacuum Oil Co.*, 310 U. S. 150, 212, 213; *U. S. v. Masonite Corp.*, 316 U. S. 265, 274; *U. S. v. Bausch & Lomb Optical Co.*, 321 U. S. 707, 720), which is merely another way of stating that public interest is conclusively presumed to exist and need not be otherwise shown in cases involving price fixing or maintenance agreements. (This is pointed out in *Lynch v. Magnavox Co.* (C. C. A. 9th) 94 Fed. 2d 883, 891, one of the cases cited by respondents).

If we paraphrase a portion of the Opinion in *Georgia v. Pennsylvania Ry. Co.*, 324 U. S. 349, 450, we have the following:

> "If the allegations of the Bill are taken as true, the economy of California and the welfare of her citizens have seriously suffered as a result of this alleged conspiracy. An agreement between all of the sugar refineries in Northern and Central California fixing prices to be paid sugar beet growers and agreeing to sell sugar beet seeds to, and refined sugar beets produced by only those farmers who will sign the uniform contract agreed to by the conspirators is but one form of trade barrier. It may cause a blight no less serious than the spread of noxious gas over the land, or the deposit of sewage in the streams. It may affect the prosperity and

welfare of the State as any diversion of water from the rivers. It may stifle, impede or cripple the sugar beet raising industry and industries dependent thereon, and may prevent the establishment of new ones. It may arrest the development of the State or put it at a decided disadvantage in competitive markets."

If all the canneries in California entered into an agreement whereby they fixed the price to be paid fruit growers and agreed upon a standard, uniform contract and refused to buy fruit from any fruit grower, except under the conditions specified in the agreed uniform contract, surely the public interest would be involved.

If all the cattle buyers buying in Texas agreed to buy cattle only at a fixed price and upon an agreed contract and refused to buy cattle from any cattle raiser who would not sign the agreed uniform contract, certainly the public interests would be involved.

If all the cotton buyers buying in Alabama entered into an agreement whereby they fixed the price to be paid the grower and would not deal with any grower who would not sign the uniform contract, certainly public interest would be involved.

Throughout the war, sugar was rationed in this country. For months after the war ceased sugar remained as one of the few products still rationed. To a brief writer, sitting in a law library and examining law books, sugar might seem to be an abstract thing; but to the American housewife, struggling to make sugar ration points supply the sugar demands of her husband, children and herself during the sugar rationing period, an adequate supply of sugar was a very important part of the American economy, and anything that restrained the flow

of sugar from its source in the beet fields to its destination on the dining table or kitchen of the housewife was of vital interest to her, to her family and to the American people!

The mere fact that the United States Government spent millions of dollars in paying sugar subsidies to "local" producers of sugar beets (7 U.S.C. 1134) likewise shows that sugar was of tremendous national importance.

If a conspiracy regarding the retail liquor business in Colorado had "the substantial economic effect upon interstate commerce necessary to bring it within the Sherman Act", as the Supreme Court held in *U. S. v. Frankfort Distilleries,* 324 U. S. 293, then surely a conspiracy to create a monopoly and fix prices paid the producers of sugar beets in California had sufficient substantial economic effect upon interstate commerce necessary to bring it within the scope of the same Sherman Act!

9. The Claim Is Not a Stale Claim.

Respondent argues that plaintiff's claim is a "stale claim between private litigants with reference to practices which ceased over 5 years ago." The claim is not stale. Laches or staleness of demand is a defense in equity, and does not apply to actions at law. In equity the defense of staleness only arises when under the facts it would be inequitable to allow the plaintiff to proceed. It is based upon estoppel. (*Maguire v. Hibernia Society,* 46 Pac. (2d) 673, 23 Cal. (2d) 719, 736; *Mott v. Holmes* (Sup. Ala.), 20 So. (2d) 461, 466; 30 C. J. S. p. 522, par. 112, p. 523, par. 113; 19 Am. Jur. p. 346, sec. 501, p. 352, sec. 508; 34 idem, p. 15, Par. 5). No such claim is made herein. In California, in both legal

and equitable actions, mere lapse of time, other than provided in the Statute of Limitations, does not bar relief. (*Maguire v. Hibernia Savings and Loan Society*, 23 Cal. (2d) 719, 736.)

Congress suspended all statutes of limitations on Sherman Act actions until June 30, 1946, (15 U.S.C., par. 16, Act Oct. 10, 1942, C. 589, 56 Stat. 781, amended June 30, 1945, C. 213, 59 Stat. 306), and the congressional statute governs. (*Holmberg v. Ambrecht*, 327 U. S. 293, 395.)

The fact that the conspirators have ceased their wrongful conspiracy does not excuse them from the statutory penalty of the Sherman Act. If it did, no private person could ever recover under the Sherman Act, because the unlawful acts would always cease before trial.

In *Addyston Pipe and Steel Co. v. U. S.*, 175 U. S. 211, the Supreme Court, on Dec. 4, 1898, held the respondents therein guilty of a violation of the Sherman Act. In *Chattanooga Foundry Works v. Atlanta*, 203 U. S. 241, the Supreme Court, on Dec. 3, 1906, upheld an action by the City of Atlanta as a private person for treble damages against one of the same conspirators arising out of the same conspiracy. This was almost 6 years after the conspirators had ceased any of the acts complained of, over 9 years after the action had commenced, and almost 12 years after the conspiracy had started. The Supreme Court found no stale demand there involved and affirmed the judgment. The times involved herein are even less.

10. The District Court Erroneously Held That Farmers Who Either Had to Sign the Crop Contract Prepared by the Conspirators or Not Grow Any Sugar at a Time When Sugar Was Vitally Needed by This Nation, Were in Pari Delicto and Could Not Recover Because They "Joined the Conspiracy and Furthered the Object of the Same" by Signing the Contract. Respondents Made No Effort to Support This Ruling Before the Circuit Court of Appeals or in Their Brief in Opposition to the Granting of Certiorari but the Circuit Court of Appeals, Instead of Repudiating Such a Holding Stated: "We Do Not Reach and Therefore Make No Expression Upon This Claim." The Circuit Court of Appeals Erred in so Doing. The Doctrine Enunciated by the District Court Would Result in Making "Private Remedies Under the Sherman Act Illusory if Not Non-Existent for Many, Perhaps Most, Victims of Restraint of Trade. Respondents Conceded Error by Making No Attempt to Support the Doctrine and Not Urging It on Appeal. The Circuit Court of Appeals Should Not Have Remained Passive When Faced With Such a Doctrine but Should Have Definitely Repudiated It. This Court Should Establish Uniformity by Repudiating the District Court's Doctrine.

Plaintiffs, faced with the choice of either not growing sugar beets or signing one of the conspirators' contracts, signed the contracts, secured the seed, grew the sugar beets, and delivered them to the only manufacturing source available, one of the conspirators' refineries. The district judge held that this made the farmers co-conspirators. *Respondents made no effort to support this*

ruling before the Circuit Court and in their Brief in Opposition to Petition for Writ of Certiorari disavowed urging it on appeal. (p. 20). The Circuit Court of Appeal however, ignored the disavowal and permitted the ruling of the District Court to stand.

Even if the plaintiffs knew of the conspiracy, they could nevertheless recover. From the days of Lord Mansfield (*Browning v. Morris* (1778), 98 Eng. Reprint 1364), it has been uniformly held that "where contracts or transactions are prohibited by positive statute for the sake of protecting one set of men from another set of men, the one, from their situation and condition, being liable to be oppressed or imposed upon by the other, there the parties are not in *pari delicto.*" (See, also, 12 Am. Jur. 735, Sec. 218; *McAllister v. Drapeau* (1939), 14 Cal. (2d) 102, 112.)

In *Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U. S. 359, 377, it was held that where a plaintiff "had complied with the defendant's restrictive terms of sale merely for the reason that otherwise he could not purchase or secure the goods necessary for the conduct of its business" he was not *in pari delicto.*

This was followed in *Rankin v. Associated Bill Posters*, 42 F. (2d) 152, 155 (cert. den. 282 U. S. 864); *Hartford Empire Co. v. Glenshaw Glass Co.*, 47 Fed. Supp. 710, 711, *Ring v. Spina* (C. C. A. 2d, 1945), 148 F. (2d) 647, 652, and *Sola Electric Co. v. Jefferson etc. Co.*, 317 U. S. 173.

Ring v. Spina presents a situation almost identical with the one at bar. There the plaintiff sued under the Sherman Act, alleging that the restraint of trade was accomplished by means of the agreement of the Dramatists Guild. Plaintiff signed it because otherwise he could not have produced his play. The District Court held, as did the district judge here, that by signing the agreement the plaintiff became *in pari delicto*. This was reversed by the Second Circuit, which stated, 148 F. (2d) 647, 652:

> "It is well settled that where one party to an illegal contract acts under the duress of another the parties are not in *pari delicto*. (Citing authorities.) . . . And in actions for triple damages under the Sherman Act a showing of economic duress similar to that asserted here has been held sufficient proof that the plaintiff is not a party to the monopoly. (Citing cases.) . . ."
>
> "But here even without a showing of economic coercion as the final step in forcing him to sign the Basic Agreement, plaintiff is precisely the type of individual whom the Sherman Act seeks to protect from combinations fashioned by others and offered to such individual as the only feasible method by which he may do business. Considerations of public policy demand court intervention in behalf of such a person, even if technically he could be considered in *pari delicto*. Indeed, this is a general principle applicable beyond the anti-trust field. (Citing cases.) . . . Any other conclusion would mean that for

> many, perhaps most, victims of restraint of trade, private remedies under the Sherman Act would be illusory, if not quite non-existent."

Faced with this doctrine, which respondents did not urge on appeal, and which as the Second Circuit said, means "that many, perhaps most, victims of restraint of trade, private remedies under the Sherman Act would be illusory, if not quite non-existent," the Circuit Court of Appeals remained passive and said:

> "We do not reach and therefore make no expression upon this claim."

We respectfully submit that such doctrine should have been repudiated instead of being permitted to remain as the rule of the Southern District of California, and that the Supreme Court, in order to secure uniformity within the circuits and to protect victims of restraint of trade should apply the *Ring v. Spina* doctrine in this case. This issue of law must be determined in view of the District Judge's ruling, and this is the logical time and place for that determination. *Respondents by declining to urge the doctrine, must be taken as conceding* that *the district court erred in expounding it.* Either the District Court was right or it was wrong in its stand on this point. If respondent claims the District Court was right, it should reply to our authorities; if respondent concedes that the District Court is wrong, it should frankly so state.

IV.
CONCLUSION

If the decision of the Circuit Court of Appeals remains as the law in the Ninth Circuit, the farmers of that vast area will be deprived, for all practical purposes, of the benefits of the Sherman Act; they will be helpless before the price-fixing and price-maintenance conspiracies and monopolies of refineries, packers, canners and processors, who can adopt the technique used by the conspiring sugar refiners herein of fixing prices and conspiring as to farmers, state by state, as long as they restrict their processing, canning, packing, refining, etc., to the state in which the products were produced by the farmers before shipping the completed product into interstate commerce.

We respectfully submit that such is not the law as enunciated by the Supreme Court of the United States for many years and that the Judgment of the Circuit Court of Appeals and the District Court should be reversed and the doctrine of the *Big Three Tobacco Companies* cases should be made applicable to the Ninth Circuit as well as the rest of the country.

> "The commerce clause of the Constitution is not to be interpreted so as to deny to Congress the power to make effective its regulation of interstate commerce. Where that effectiveness depends upon a regulation or prohibition attaching, regardless of whether the particular transaction in issue is inter-

state or intrastate in character, a transaction that concerns a business generally in interstate commerce, Congress may act. Such is this case."

U. S. v. Walsh (May 19, 1947), 91 U. S. Sup. Ct., L. Ed. A.O. 1175.

Congress "has declared that the rule of trade and commerce should be competition, not combination." (*U. S. v. Crescent Amusement Co.*, 323 U. S. 173, 187, and that declaration protects farmers as well as buyers. (*Swift & Co. v. U. S.*, 196 U. S. 375; 286 U. S. 105; *U.S.A. v. American Tobacco Co.*, 221 U. S. 106; *American Tobacco v. U. S.* 328 U. S. 781; *Local 167 v. U. S.*, 291 U. S. 293; *U. S. v. Borden*, 308 U. S. 188.)

The Sherman Act is a "Charter of Freedom" for producers as well as consumers.

Respectfully submitted,

GUY RICHARDS CRUMP,
Attorney for Petitioners.